INTERIOR BOARD OF INDIAN APPEALS

Estate of George Fishbird

40 IBIA 167 (12/15/2004)

Related Board case:
36 IBIA 269

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF GEORGE FISHBIRD	:	Order Affirming Decision
	:	
	:	
	:	Docket Nos. IBIA 03-18
	:	IBIA 03-21
	:	
	:	December 15, 2004

These are appeals from a September 5, 2002, order issued by Administrative Law Judge Robert G. Holt in the estate of George Fishbird (Decedent), Probate No. IP BI-135-A-90 (001-202–096N). The September 5, 2002, order let stand Judge Holt's April 25, 2002, decision approving Decedent's will. Appellants in Docket No. IBIA 03-18 are Clifford Stump, John Stump, Jr., Patsy Gopher and Florence Sunchild (Blanket Stump Heirs). 1/ Appellant in Docket No. IBIA 03-21 is Geneva TopSky Stump (Geneva). For the reasons discussed below, the Board affirms Judge Holt's April 25, 2002, decision and September 5, 2002, order.

Decedent executed a will on December 14, 1979, in which he devised his entire estate to his friend and guardian, William Stump (William). Decedent died on August 15, 1989, owning interests in trust property on the Crow Reservation. On June 1, 1990, Administrative Law Judge Keith L. Burrowes held a hearing in the probate of Decedent's trust or restricted estate. However, before Judge Burrowes issued a decision, his office was closed and he retired. The probate of Decedent's estate was transferred to the Salt Lake City office of the Office of Hearings and Appeals. On January 31, 2001, Judge James H. Heffernan issued a decision in which he approved Decedent's will. Three petitions for rehearing were filed. By order dated May 31, 2001, Judge Heffernan denied two of the petitions and granted the third. He denied petitions filed by Geneva and Sylvia Stops (Stops). He granted a petition filed by the Blanket Stump Heirs and transferred the matter to Judge Holt, who by then had jurisdiction over probates arising on the Crow Reservation.

Geneva and Stops appealed to the Board from the denial of their petitions for rehearing. On August 16, 2001, the Board vacated Judge Heffernan's January 31, 2001, decision and

1/ These appellants, the children of Blanket Mighty Voice Stump, were designated the "Blanket Stump Heirs" in Judge Holt's decision.

May 31, 2001, order and referred the entire estate to Judge Holt for supplemental hearing and decision. The Board's order provided that "[t]he order issued after the supplemental hearing shall be deemed an initial probate decision and shall therefore be subject to the requirements of 43 C.F.R. § 4.241 that a petition for rehearing be filed with Judge Holt before a notice of appeal can be filed with the Board." Estate of George Fishbird, 36 IBIA 269, 272 (2001).

Judge Holt held supplemental hearings on November 29, 2001, and January 30, 2002. At the hearings, the Blanket Stump Heirs, Geneva, and Stops claimed to be Decedent's heirs and therefore entitled to participate in the distribution of his estate. The Blanket Stump Heirs and Stops also challenged Decedent's will, contending that he lacked testamentary capacity and that he had been subjected to undue influence by Geneva who, at the time the will was executed, was married to William, the beneficiary under the will. At the first hearing, Geneva also stated her intent to challenge the will. However, because time ran out, she did not have an opportunity to present evidence at that hearing. She did not attend the second hearing.

The principal witness at the first hearing was James W. Spangelo, an attorney who prepared Decedent's will and also served as a will witness. 2/ Spangelo testified at length about the circumstances surrounding the will execution, and a detailed memorandum he had prepared at the time the will was executed was admitted as an exhibit. His evidence was summarized in Judge Holt's April 25, 2002, decision:

> Decedent came to Mr. Spangelo's office with Geneva. Geneva described what Decedent wanted in his will. Mr. Spangelo then drafted the will. After the will was drafted Mr. Spangelo then read the will to Decedent paragraph by paragraph. Mr. Spangelo next had Geneva translate the concepts of the will to Decedent in the Cree language. Decedent indicated that he understood. Mr. Spangelo also related a conversation between himself and Geneva which Decedent was able to follow. The other witnesses then came into the room. Decedent signed and the witnesses signed. Waldo Spangelo [the father of James Spangelo and also an attorney] asked some questions including whether Decedent wanted to leave everything to William. Decedent said "yes." Mr. Spangelo said that Decedent knew that he had property on the Crow Reservation, although not the exact allotment numbers, and knew he wanted to give it to William. Decedent was living with William and Geneva at the time he prepared the will. Mr. Spangelo surmised that Decedent wanted William to have his land because William had been good to him. Mr. Spangelo testified that he believed that Decedent was not being influenced by anyone to give his property to William. Mr. Spangelo testified that he knew Decedent could not read the English language and was considered by some to be somewhat slow in his capabilities. However Mr. Spangelo offered the opinion that Decedent was

---

2/ Of the other two will witnesses, one had died and the other could not be located.

> intelligent enough that he could have functioned at a higher level if he had been given additional educational opportunities.

Apr. 25, 2002, Decision at 5-6. Other witnesses testified at the two hearings concerning the heirship claims of the parties, Decedent's testamentary capacity, and the allegation that Geneva had unduly influenced Decedent.

In his April 25, 2002, decision, Judge Holt approved Decedent's will and held that Decedent's estate should be distributed to Monte Ray Stump and Daniel Dion Stump (Monte and Daniel), the beneficiaries under William's will. 3/ With respect to the heirship claims of the parties, he found, based on the evidence before him, that: (1) Stops had not established that she was an heir of Decedent, (2) the Blanket Stump Heirs were second cousins of Decedent and thus potential heirs, and (3) Geneva was a second cousin once removed and thus a potential heir. However, because the evidence concerning parts of Decedent's family was incomplete, the Judge declined to make a definitive determination of heirship. Instead, he found that, because Decedent had left a valid will, the identity of all Decedent's heirs need not be determined.

With respect to Decedent's will, Judge Holt found that Decedent had the testamentary capacity to make a will when he did so in 1979. Next, he found that the will contestants had failed to establish that undue influence had been exerted upon Decedent. He recognized, however, that in certain cases where a confidential relationship exists, there is a presumption of undue influence, which does not depend upon proof that undue influence was actually exerted upon the testator.

Quoting from Board cases, Judge Holt described the elements of the presumption:

> In order for a presumption of undue influence to arise from the existence of a confidential relationship, three things must be shown: (1) a confidential relationship existed; (2) the person in the confidential relationship actively participated in the preparation of the will; and (3) the person in the confidential relationship was the principal beneficiary under the will. When these three elements are shown, there is a presumption of undue influence, and the burden shifts to the will proponents to show that the testator was not subjected to undue influence.

Apr. 25, 2002, Decision at 9. See Estate of Ernestine Lois Ray, 33 IBIA 92, 96 (1998); Estate of Orville Lee Kaulay, 30 IBIA 116, 122 (1996); and Estate of Grace American Horse

---

3/ William died on Oct. 1, 1989. Under his will, approved by an Order Approving Will and Decree of Distribution issued on Jan. 31, 1994, his estate was distributed in equal shares to his son Monte and his grandson Daniel.

Tallbird, 26 IBIA 87, 88 (1994). Judge Holt continued: "When presumptive undue influence is present, the Board has held that '[t]o rebut this presumption, [a will proponent] must show that decedent received independent advice regarding the execution of the will.' Estate of Charles Webster Hills, 13 IBIA 188 (1985)." Apr. 25, 2002, Decision at 9.

Applying the three elements described above to this case, Judge Holt stated:

> First, the undisputed evidence established that a confidential relationship existed between Decedent and William because William had been appointed Decedent's guardian when the will was made in 1979. Second, there is no evidence that William actively participated in the preparation of the will. However, as argued by those contesting the will, William's wife at the time, Geneva, did participate in the will preparation. Although there is no evidence that Geneva was acting as William's representative in his capacity as guardian, for purposes of this analysis the undersigned will assume that this second requirement has been satisfied. Third, Decedent did name William, his guardian, as the principal beneficiary under the will. Thus, for purposes of this analysis, it will be assumed that the elements for a presumption of undue influence have been satisfied.

Id. at 10. Concerning rebuttal of the presumption, he stated:

> In order to rebut the presumption, it must be shown that Decedent received independent advice regarding the execution of the will. Mr. Spangelo testified that another attorney, James W. Zion, represented William in William's capacity as guardian for Decedent. Mr. Spangelo testified that he had been retained to represent Decedent, not the guardian, in the preparation of the will. Primarily from Mr. Spangelo's testimony and his contemporaneous memorandum * * *, the undersigned finds that Decedent received independent advice regarding the execution of the will. Therefore, the undersigned concludes that the presumption of undue influence has been adequately rebutted and does not apply.

Id.

Having found that Decedent's will was properly executed, that Decedent possessed testamentary capacity when he executed his will, that he was not subjected to actual undue influence, and that the presumption of undue influence had been rebutted, Judge Holt approved Decedent's will.

Petitions for rehearing were filed by the Blanket Stump Heirs, Geneva, and Stops. Judge Holt denied all three petitions in his September 5, 2002, Order Denying Petitions for Rehearing and Partially Modifying Decision. Also in that order, he modified his initial decision to distribute Decedent's entire estate to the Estate of William Stump, Sr., rather than to Monte and Daniel. He made this change in light of Geneva's indication that she intended to seek reopening of William's estate.

The Blanket Stump Heirs and Geneva filed appeals with the Board. Filings have also been made by Stops and by Monte and Daniel.

The Blanket Stump Heirs make arguments relating to the presumption of undue influence. 4/ They contend that Judge Holt should have, but did not, shift the burden of proof to the will proponents to show that no undue influence was exercised. They also object to statements made by Judge Holt in his September 5, 2002, order concerning the hiring of Spangelo to draft Decedent's will. Finally, they object to the Judge's consideration of the evidence given by Spangelo.

The Blanket Stump Heirs contend that, "[r]ather than shifting the burden of proof onto the Devisee, [Judge Holt] summarily dismisses the presumption of undue influence upon finding that '...Decedent received independent advice regarding the execution of the will.'" Blanket Stump Heirs' Opening Brief at 4. They do not develop this argument, and it appears likely that they have misunderstood both Judge Holt's decision and the Board's statements on this point. Under the Board's cases, where the burden shifts to a will proponent to show there was no undue influence, the will proponent carries that burden by showing that the testator received independent advice regarding his/her will. This principle is seen most clearly in Estate of Charles Webster Hills, supra, a case cited by Judge Holt and relied upon by the Blanket Stump Heirs:

> Normally, the will contestants bear the burden of proving undue influence was exerted upon a testator. * * * However, the Board has also held that when the facts of a particular case show that the principal beneficiary under an Indian will was in a confidential relationship with the testator and actively participated in the preparation of the will, a rebuttable presumption arises that undue influence was exerted upon the testator, and the burden shifts to the will proponent to show there was no undue influence. * * *
>
> * * * * * *

4/ The Blanket Stump Heirs do not pursue other arguments they made before Judge Holt, in particular the argument that Decedent lacked testamentary capacity.

> * * * To rebut this presumption, [the will proponent] must show that [the testator] received independent advice regarding the execution of the will. * * * In order to rebut the presumption, there must be a showing that an objective, independent person discussed the effect of the will with the [testator].

13 IBIA at 194-195. It was not error for Judge Holt to conclude that the presumption of undue influence had been rebutted, based upon a finding that Decedent had received independent advice about his will. Nothing more was required to rebut the presumption.

Next, the Blanket Stump Heirs contend that Judge Holt "erred by inferring about the participation of Mr. Zion in this matter." Blanket Stump Heirs' Opening Brief at 4. They object in particular to the following two sentences in Judge Holt's September 5, 2002, order: "It can be **inferred** that Mr. Zion [counsel for William] did understand the legal issue involved when a testator desires to devise a substantial amount of his land to his guardian. It may also be **inferred** that Mr. Zion insisted that a separate attorney, Mr. Spangelo, be hired to represent Decedent." Sept. 5, 2002, Order at 4 (Emphasis added by the Blanket Stump Heirs).

It is clear that Judge Holt did not rest any of his conclusions upon either of these inferences. In response to the Blanket Stump Heirs' contention that Spangelo had been hired by William and Geneva, Judge Holt observed that the Blanket Stump Heirs had produced no evidence that that was the case. He continued:

> While the evidence may not have disclosed who, as between William, Geneva or Mr. Zion, made the contact which resulted in the hiring of Mr. Spangelo, the evidence is uncontested that Mr. Spangelo represented Decedent and not William or Geneva in preparation of the will. The identity of the person making the decision to hire a separate attorney to represent a testator who is under a guardianship is not the relevant fact in concluding whether the testator received independent advice. The relevant fact is that the testator received independent advice. The facts in this estate are undisputed that Mr. Spangelo represented and advised the Decedent and not the guardian, William, in the preparation of Decedent's will.

Id.

The Board declines to hold that Judge Holt erred in drawing the two inferences cited by the Blanket Stump Heirs but notes that, even if it was error, it was harmless error because Judge Holt's decision was not based upon them.

In further contentions concerning the hiring of Spangelo, the Blanket Stump Heirs argue that Judge Holt "erred in requiring [them] to cite to some authority requiring the Decedent to make his own decision to hire a separate attorney to prepare his will." Blanket

Stump Heirs' Opening Brief at 5. "Furthermore," they argue, the Judge "erred by requiring [them] to prove up their case, hold[ing] that [they] 'cite no evidence that Mr. Spangelo was hired by William and Geneva.'" Id. at 6. The Blanket Stump Heirs evidently consider Judge Holt's statements to be evidence that he failed to shift the burden of proof to the will proponents. Here, the Blanket Stump Heirs confuse the burden of proof as to undue influence with the responsibility borne by any party to support that party's arguments. Insofar as the Blanket Stump Heirs were contending before Judge Holt that, as a matter of law, the decision to hire a separate attorney must have been made by Decedent and that, as a matter of fact, Spangelo was hired by William and Geneva, the burden was upon them to support those arguments. They did not do so before Judge Holt and have not done so before the Board.

Next, the Blanket Stump Heirs argue that Spangelo's evidence should not have been considered because he had a conflict of interest and was therefore not a disinterested witness. In connection with this argument, they contend that "the 1979 will was not attested by two disinterested adult witnesses as required by 43 CFR 4.260(a)." Id. at 7. 5/

It appears that the Blanket Stump Heirs have confused Spangelo's role as a will witness with his role as a witness at the probate hearing. As indicated above, Spangelo was one of three witnesses to Decedent's will.

No challenge was made to any of the will witnesses during prior proceedings in this matter. The Board ordinarily does not consider arguments made for the first time on appeal, see, e.g., Miller v. Rocky Mountain Regional Director, 39 IBIA 57 (2003), and sees no reason to do so here. In any event, the Blanket Stump Heirs fail entirely to support their contention that the will was not attested by two disinterested adult witnesses.

The Blanket Stump Heirs contend that Spangelo had a conflict of interest because he served as will scrivener, will witness, and notary public for the will in 1979; was appointed guardian of Decedent in 1986 in place of William; attempted to represent Geneva in the proceedings before Judge Holt; and did represent her during earlier proceedings in this probate. They ask the Board "to overturn [Judge Holt's] reliance on the testimony and contemporaneous memorandum of Mr. Spangelo as he is clearly conflicted in this matter and could not have provided the independent advice as [Judge Holt] states." Blanket Stump Heirs' Opening Brief at 8. The Board interprets this argument as one alleging a conflict of interest sufficient to taint both Spangelo's testimony at the 2001 hearing and the memorandum he prepared in 1979.

5/ 43 C.F.R. § 4.260(a) provides: "An Indian 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses."

The Blanket Stump Heirs did not make this argument before Judge Holt. Therefore, for the reason noted above, the Board will not consider it. As with the preceding argument, the Blanket Stump Heirs present nothing at all to support their contention that a conflict of interest resulted from Spangelo's service as will scrivener, will witness, and notary public for the will or from his later service as Decedent's guardian. 6/

The Board finds that the Blanket Stump Heirs have failed to show error in either Judge Holt's April 25, 2002, decision or his September 5, 2002, order.

Geneva contends that (1) her relation to Decedent was closer than that of the Blanket Stump Heirs, and she was therefore entitled to receive Decedent's estate to the exclusion of the Blanket Stump Heirs; (2) only the persons who appeared at the 1990 hearing were entitled to be considered parties eligible to receive any part of Decedent's estate; (3) she did not receive notice of the probate of William's estate in 1994, and believes proceedings in William's estate were never concluded; (4) Judge Burrowes ordered the parties to settle Decedent's estate, and that order should have precluded any further proceedings in the estate; 7/ (5) she was never divorced from William; and (6) she is entitled under Montana law to receive part of William's estate.

Geneva made these same arguments before Judge Holt, who addressed them thoroughly before rejecting them. Geneva has done nothing to show error in Judge Holt's conclusions. While there is no need to repeat the Judge's analysis here, it may be observed

---

6/ Their most serious allegation concerns Spangelo's representation and attempted representation of Geneva in this matter. Spangelo entered an appearance as Geneva's attorney on Sept. 22, 1995, and made written filings at various times during the pendency of this matter. On Oct. 18, 2001, Judge Holt issued an order disqualifying Spangelo from representing any party other than himself because he was a necessary witness at the hearing scheduled for November 29, 2001. The Judge based his order upon the Montana Rules of Professional Conduct for attorneys and upon that fact that Geneva was expected to challenge the will and to present evidence contrary to the testimony Spangelo was expected to give.

While this incident suggests that Spangelo had an incomplete grasp of the ethical requirements of his profession, it does not show that either his 1979 memorandum or his testimony at the 2001 hearing was tainted by a conflict of interest or that it was otherwise unreliable.

7/ No order from Judge Burrowes concerning settlement appears in the probate record. Some of the parties signed a settlement agreement in 1995 and submitted it in June 1996. In his Apr. 25, 2002, decision, Judge Holt declined to approve the agreement under 43 C.F.R. § 4.207 because it was not signed by all parties in interest.

that Geneva's arguments are essentially irrelevant to the issue of the validity of Decedent's will. The Board finds Judge Holt's analysis persuasive and therefore adopts it. See Sept. 5, 2002, Order at 7-12.

The Board finds that Geneva has failed to show error in either Judge Holt's April 25, 2002, decision or his September 5, 2002, order.

Stops did not appeal Judge Holt's order. She was advised in a Board order dated April 29, 2003, that, by failing to appeal, she had "forfeited her right to challenge any finding in [Judge Holt's] order relating to her, including * * * the substantive issue of whether she is entitled to be recognized as an heir of decedent." She was further advised that "her participation in these appeals [would be] limited to a challenge to the appeals filed by [the Blanket Stump Heirs and Geneva.]"

Stops does not challenge either of these appeals. Instead, she attempts to reassert her claim to be an heir of Decedent. As she has been informed, this is an argument that cannot be considered. 8/

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Holt's April 25, 2002, decision and September 5, 2002, order are affirmed.

// original signed	// original signed
Anita Vogt	Steven K. Linscheid
Senior Administrative Judge	Chief Administrative Judge

8/ Stops also alleges that most of Decedent's land has been sold off since his death and that his IIM (individual Indian money) account has dwindled. While she makes only the barest of allegations in this regard, the Board will, out of an abundance of caution, refer her complaint to the Assistant Secretary - Indian Affairs for investigation, as appropriate.